

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BRADLEY R. KOSS,

Plaintiff,

CASE NO. 1:09-CV-352

v.

HON. ROBERT J. JONKER

DONALD TOMPKINS and
MICHIGAN DEPARTMENT OF
CORRECTIONS,

Defendants.

ORDER ADOPTING REPORT AND RECOMMENDATION

The Court has reviewed Magistrate Judge Brenneman's Report and Recommendation in this matter (docket # 44) and Plaintiff Koss's Objections to the Report and Recommendation (docket # 45). Under the Federal Rules of Civil Procedure, where, as here, a party has objected to portions of a Report and Recommendation, "[t]he district judge . . . has a duty to reject the magistrate judge's recommendation unless, on de novo reconsideration, he or she finds it justified." 12 WRIGHT, MILLER, & MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3070.2, at 381 (2d ed. 1997).

Specifically, the Rules provide that:

The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

FED R. CIV. P. 72(b). De novo review in these circumstances requires at least a review of the evidence before the Magistrate Judge. *Hill v. Duriron Co.*, 656 F.2d 1208, 1215 (6th Cir. 1981). The Court has reviewed de novo the claims and evidence presented to the Magistrate Judge; the Report and Recommendation itself; and Plaintiff's objections. After its review, the Court finds that Magistrate Judge Brenneman's Report and Recommendation is factually sound and legally correct.

In his Report and Recommendation, Magistrate Judge Brenneman recommends that Defendants' Motion for Summary Judgment (docket # 33) be granted. Mr. Koss raises multiple objections to the Report and Recommendation, none of which change the analysis in this case. In his complaint, Mr. Koss alleges that Defendant Tompkins prevented him from participating in Eid-ul-Fitr in 2006, 2007 and 2008, in violation of his civil rights, by failing to place him on the callout list for participants. The Magistrate Judge accurately determined that Mr. Koss did not exhaust his administrative remedies in connection with the alleged 2006 and 2007 violations. The record establishes, and Mr. Koss concedes, that he did not file grievances regarding his ability to participate in Eid-ul-Fitr in those years. Mr. Koss objects that the alleged failures to allow him to participate were not grievable offenses, but his own grievances concerning his ability to participate in the 2008 Eid-ul-Fitr belie this objection. (Obj., docket # 45, at 2-3; Compl., docket # 1, Ex. 1.) For the reasons described in the Report and Recommendation, summary judgment regarding the claims arising out of the alleged 2006 and 2007 violations is appropriate, because Mr. Koss failed to exhaust his administrative remedies.

Mr. Koss's claims regarding participation in the 2008 Eid-ul-Fitr fail as well. In addition to the reasons stated in the Report and Recommendation, Defendants are entitled to summary judgment on these claims because the record establishes that Mr. Koss actually did get to participate in the 2008 Eid-ul-Fitr. (*See* Br. in Support of Mot. for Summ. J., docket # 34, Ex. A, Tompkins

Aff.) Mr. Koss objects that the staff could not have provided him with a handwritten pass to attend Eid-ul-Fitr, but he offers no evidence that supports this statement. Nor does Mr. Koss explicitly deny that staff allowed him to participate in the 2008 Eid-ul-Fitr; rather he says only that he was not on the callout list, which no one disputes. Mr. Tompkins, in contrast, expressly states under oath that Plaintiff received a handwritten pass and that Plaintiff actually used it to attend the event. There is no rebuttal offered to these decisive facts. Accordingly, the record supports summary judgment for Defendants.

ACCORDINGLY, IT IS ORDERED that the Report and Recommendation of the Magistrate Judge (docket # 44) is approved and adopted as the opinion of the Court, except that the Court grants the Defendants summary judgment on the 2008 claim for reasons recited in this order.

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment (docket # 33) is **GRANTED**.

IT IS FURTHER ORDERED that for the same reasons that the Court dismisses the action, the Court discerns no good-faith basis for an appeal within the meaning of 28 U.S.C. § 1915(a)(3). *See McGore v. Wigglesworth*, 114 F.3d 601, 611 (6th Cir. 1997).

This case is **DISMISSED**.

Dated: September 17, 2010

/s/ Robert J. Jonker
ROBERT J. JONKER
UNITED STATES DISTRICT JUDGE